REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 371 OF 1998

(From the original civil suit No. 247 of 1992 of PM's Court at Thika)

KAMAU NJOROGE ………………………………………..APPLICANT

VERSUS

PETER NDUNGU…………………………………………RESPONDENT

J U D G M E N T

On 17th September 1997 the respondent filed an application in the Senior Principal Magistrate' s court at Thika for the confirmation of the grant which had been issued on 13th January 1994. The order for confirmation was made on 16th January 1998.

Though the application for confirmation had been served upon counsel for the appellant – a son and beneficiary of the deceased estate, neither him nor counsel appeared hence the order for confirmation was granted exparte.

Then on 18th August 1998, the appellant, through counsel, filed an application, to seek, amongst others, an order for review of the order of 16th January 1998 and that the court do allow him protest against the application for confirmation dated 11th August 1997.

This application was heard on 4th September, 1998 when counsel for the appellant submitted thereon. Apparently there was no appearance for the respondent and this is what the appellant's counsel said:-

> **"The main prayer is prayer 2 for review of orders of confirmation of the g rant and that the heirs to the estate be determined. It is grounded in the affidavit in support. The applicants were not made aware of the application to confirm the grant. Hence they could not protest. There was a mistake on the advocate and the same should not be visited on the litigant. The question is not res judicata. That has not been done. The issue of determination of shares has not been done."**

A ruling to this application was delivered on 1.10.98 and was short. It said:

> **"I have duly cons idered this application for review of the orders of this court made on 16.1.98. I have not found any basis to warrant the review of the orders made on 16.1.98, that being so, I now dismiss the application dated 18.8.98, no order as to costs."**

This is the ruling, the subject of the present appeal dated and filed in this court on 25th October 1998. It had two (2) grounds of appeal; namely that the learned magistrate misdirected himself by not appreciating that the appellant's application had merit and the same ought to have been granted and that he erred in fact in finding that the appellant's application lacked merit whereas the same was justified.

In this court on 10th February 2003 counsel for the appellant (Miss Mbugua) presented the appeal and said the magistrate gave no reasons for ruling that the application had no merit when there was good reason that a mistake of counsel should not be visited upon the client. That the application was meritorious and justifiable and that it should have been allowed. She prayed for the appeal to be allowed with costs.

Counsel for the respondent opposed the appeal and said that the shares of the beneficiaries of the estate had been laid out and described with the respondent being given plot T1 and 4.45 acres while the appellant was given 1.45 acres as a result of a court order of 13th January 1994 after all the parties had been heard. That even though the appellant was not heard on the application for confirmation, he was not prejudiced because he had been heard before the order of 13.1.94 over which he did not appeal, was made.

That the application for review was based on the reason that the issue of shares had not been determined which was not correct because this had been done in the order of 13th January, 1994. According to counsel this application was improperly before the court as it should have been filed by way of an application for revocation of grant. He prayed for the appeal to be dismissed with costs. It is true the magistrate wrote and delivered a brief Ruling which did not give particular reasons for the decision.

But the appellant's application was for review of the lower court order of 1st October 1998 under order XLIV of the Civil Procedure Rules. It was based on the ground that the heirs to the estate had not been determined.

This is not true because the beneficiaries of the estate and their shares had been determined by the court order of 13th January 1994 after parties including the appellant, had been heard. Paragraph 5 of the supporting affidavit to the application for confirmation filed in court on 13.1.97 is very clear on this (see the ruling of 13/11/94).

Even if this were not so, this was not new and important matter or evidence not within the knowledge of the appellant before the order was made, to form the basis of an application for review as required by the above quoted rules. Nor did this amount to an error apparent on the face of the record to warrant the lower court to issue an order of review as sought. That the appellant was not aware of the application for confirmation of grant or that mistakes of counsel should not be visited upon the litigant were neither here nor there in an application of the nature subject to this appeal.

In any case it appears what the appellant was disputing was the order of the court dated 13th January 1994 against which, unfortunately, he did not appeal.

And if, for any sufficient reason the appellant was not satisfied with the order for confirmation of grant, why could he not apply the provisions of Section 76 of the Law of Succession Act to resolve the matter?

He did not do this only to come up with an application for review of an order made 8 months earlier, which in the circumstances of the case, was inordinately late.

When all these observations are considered, then there is only one reasonable conclusions to reach, that the magistrate was right in dismissing the application for review in his ruling of 1/10/98 and that this appeal has no merit.

It is hereby dismissed with costs.

Delivered this 24th day of February, 2003.

D.K.S. AGANYANYA

JUDGE